3-20-2014

# State v. McKean Appellant's Brief Dckt. 41004

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>SHANNON MARIE MCKEAN,<br><br>Defendant-Appellant. | ) | NO. 41004<br><br>CANYON CO. NO. CR 2012-21064 & 2012-14826<br><br>APPELLANT'S BRIEF |

# BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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## STATEMENT OF THE CASE

### Nature of the Case

Shannon Marie McKean appeals from her judgment of conviction for two counts of delivery of a controlled substance and five counts of possession of a controlled substance with the intent to deliver. Ms. McKean was found guilty following a jury trial and the district court imposed concurrent unified sentences of five years, with two years fixed. Ms. McKean now appeals, and she asserts that the district court erred by determining that AM-2201 was a controlled substance as a matter of law and by excluding evidence that she relied on lab reports on the substances she purchased because they were relevant to demonstrate the effect on the listener. Ms. McKean asserts that the recent opinion by the Court of Appeals in *State v. Alley*, 318 P.3d 962 (2014) controls the first issue and that the district court erred by determining that the lab reports only demonstrated a mistake of law.

### Statement of the Facts and Course of Proceedings

On May 3, 2012, Charles Gentry, a Deputy Canyon County Sheriff with the Narcotic Unit visited a shop called Smoke Effects in an undercover capacity. (Tr., Vol. II, p.176, L.15 – p.182, L.9.) Wesley Reed, Troy Harrell, and Ms. McKean were present in the store that day. (Tr., Vol. II, p.182, Ls.20-25.) He purchased a small bag of Fire N' Ice for $12.76. (Tr., Vol. II, p.185, L.16 – p.186, L.25.) This product subsequently tested positive for JWH-122/210. (Tr., Vol. II, p.360, Ls.1-2.) On May 21, 2012, Deputy Gentry again visited the shop and purchased another bag of Fire N' Ice. (Tr., Vol. II, p.190, Ls.11-14.) This product subsequently tested positive for JWH-210. (Tr., Vol. II, p.361, Ls.9-12.)

On June 6, 2012, Deputy Gentry conducted a search at Ms. McKean's and Mr. Harrell's residence. (Tr., Vol. II, p.195, Ls.13-15.) He collected 91 bags of "Scooby Snax" at the residence. (Tr., Vol. II, p.203, Ls.3-5.) This product tested positive for AM-2201. (Tr., Vol. II, p.364, Ls.8-14.) Officer Eldridge from the Caldwell City Police collected bags of Fire N' Ice, Mad Hatter, AK-47, and Down 2 Earth from Smoke Effects that same day. (Tr., Vol. II, p.257, L.22 – p.259, L.3.) These products tested positive for JWH-210/122, AM-2201, AM-2201, and AM-2201, respectively. (Tr., Vol. II, p.360, Ls.1-2, p. 363, Ls.5-8, p.362, Ls.9-11, p.363, Ls.15-25.)

In CR 2012-14826, Ms. McKean was charged with two counts of delivery of a controlled substance by aiding and abetting another to deliver Fire N' Ice, a Schedule I non-narcotic synthetic drug equivalent to Tetrahydrocannabinol or Cannibis. (R., pp.14-15.) She was alleged to have aided delivery to Deputy Gentry on May 3 and May 21, 2012. (R., pp.14-15.)

In CR 2012-21064-C, Ms. McKean was charged with five counts of possession of a controlled substance with the intent to deliver and one count of possession of drug paraphernalia. (R., p.79.)[1] These charges were for four counts of possession of AM-2201(AK-47, Mad Hatter, Scooby Snax, and Down 2 Earth) and one count of possession of JWH-210 (Fire N' Ice). (R., pp.79-81.) The cases were consolidated without objection. (R., p.104.)

Ms. McKean did not dispute that she possessed the items or sold the items at the store. (Tr., Vol. II, p.,139 L.20 – p.140, L.15.) Rather, her defense was that she did not know that she possessed synthetic cannabinoids. (Tr., Vol. II, p.140, Ls.10-15.) At trial, Ms. McKean informed the jury that she would introduce evidence that she based her

[1] Ms. McKean was found not guilty of possession of drug paraphernalia. (R., p.398.)

reliance on lab reports she received from the companies from which she purchased the substances. (Tr., Vol. II, p.144, Ls.16-20.) The district court prohibited Ms. McKean from introducing this evidence. (Tr.,Vol. II, p.167, L.4 – p.168, L.4.)

Also, prior to trial, the State filed a motion for judicial ruling that JWH-210, JWH-122, and AM-2201 were controlled substances. (R., p.107.) Ms. McKean did not dispute that JWH-210 and JWH-122 were controlled substances, but did dispute that AM-2201 was a controlled substance. (*See* R., p.140.) The district court held an evidentiary hearing in which an expert witness testified for each party. Following that hearing, the district court held that, "AM-2201 is a controlled substance that falls within Idaho Code 37-2705(30)." (Tr., Vol. 1, p.211, Ls.10-13.) The court instructed the jury as such. (R., p.381.)

Ms. McKean was convicted at trial and the district court imposed concurrent unified sentences of five years, with two years fixed, and the court suspended the sentences and placed Ms. McKean on probation. (Tr., Vol. II, p.551, L.21 – p.552, L.9.) Ms. McKean appeals. (R., p.420.)

## ISSUES

1. Did the district court err by concluding that AM-2201 was a controlled substance as a matter of law?

2. Did the district court err by excluding evidence that Ms. McKean relied on reports indicating that the substances were not synthetic cannabinoids?

## ARGUMENT

### I.

### The District Court Erred By Concluding That AM-2201 Was A Controlled Substance As A Matter Of Law

#### A. Introduction

Ms. McKean asserts that the district court erred when it determined that AM-2201 was a controlled substance as a matter of law. Whether AM-2201 is a controlled substance is a question of fact for the jury, and because Ms. McKean was precluded from presenting this defense, her convictions must be vacated.

#### B. Standard Of Review

This Court exercises free review over the application and construction of statutes. *State v. Reyes,* 139 Idaho 502, 505 (Ct.App.2003). The language of the statute is to be given its plain, obvious, and rational meaning. *State v. Burnight,* 132 Idaho 654, 659 (1999). If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *State v. Escobar,* 134 Idaho 387, 389 (Ct.App.2000). When this Court must engage in statutory construction because an ambiguity exists, it has the duty to ascertain the legislative intent and give effect to that intent. *State v. Beard,* 135 Idaho 641, 646 (Ct.App.2001). Not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give an ambiguous statute an interpretation that will not render it a nullity. *Id.* A court must also give effect to all the words and provisions of the statute if possible, so that none will be void, superfluous, or redundant. *State v. Yzaguirre,* 144 Idaho 471, 475 (2007). If, after examining the legislative history, a criminal statute is

still ambiguous, the rule of lenity applies and the statute must be construed in favor of the accused. *State v. Dewey,* 131 Idaho 846, 848 (Ct.App.1998).

C. The District Court Erred By Concluding That AM-2201 Was A Controlled Substance As A Matter Of Law

Prior to trial, the State filed a motion for judicial ruling, seeking a ruling that that JWH-210, JWH-122, and AM-2201 were controlled substances, and, "to preclude the defense from presenting evidence and argument to the jury disputing that JWH-210, JWH-122, and AM-2201 are controlled substances." (R., p.107.) Ms. McKean did not dispute that JWH-210 and JWH-122 were controlled substances; the dispute in this case centers solely on AM-2201. (*See* R., p.140.) The district court held an evidentiary hearing in which expert witnesses testified for each party. Following that hearing, the district court held that, "AM-2201 is a controlled substance that falls within Idaho Code 37-2705(30)." (Tr., Vol. 1, p.211, Ls.10-13.) The district court erred.

The Court of Appeals addressed this precise issued very recently in *State v. Alley*, 318 P.3d 962 (2014).[2] Like the defendant in *Alley*, Ms. McKean was charged with a violation of former I.C. § 37-2705(d), which then defined schedule I controlled substances to include the following chemicals:[3]

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[2] The State submitted the district court's memorandum decision in *Alley* in support of its motion in this case. (R., p.111.)

[3] The Court of Appeals noted,

> The version of I.C. § 37–2705(d)(30)(ii)(a) in effect when Alley was charged was recently amended. *See* 2012 Idaho Sess. Laws, ch. 181. The statute is now found at I.C. § 37–2705(d)(31)(ii) and the disputed language "by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2–(4–morpholinyl)ethyl" and similar language in subsections (ii)(a)-(f) has been replaced with "to any extent." Alley concedes that the new statutory language includes AM–2201 as a schedule I controlled substance.

> (30) Tetrahydrocannabinols or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure such as the following:
>
> i. Tetrahydrocannabinols:
>
> ....
>
> ii. The following synthetic drugs:
>
> a. Any compound structurally derived from 3–(1–naphthoyl)indole ... by substitution at the nitrogen atom of the indole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2–(4–morpholinyl)ethyl, whether or not further substituted in the indole ring to any extent, whether or not substituted in the naphthyl ring to any extent.

I.C. § 37-2705(d); *see also Alley*, 318 P.3d at ___.[4]

In *Alley*, the Court of Appeals noted that the parties agreed that "AM–2201 is a compound structurally derived from 3–(1–naphthoyl)indole by substitution at the nitrogen atom of the indole ring, but they presented divergent evidence concerning the meaning of the word "alkyl" and whether AM–2201 is derived by a substitution by an alkyl." *Alley*, 318 P.3d at ___. The Court of Appeals concluded that the district court was presented with conflicting testimony on the meaning of the term, "alkyl" and, therefore, held that the term was ambiguous. *Alley*, 318 P.3d at ___. The Court of Appeals then concluded that the legislative history did not make the term clear. *Alley*, 318 P.3d at ___. Therefore, the Court of Appeals applied the rule of lenity, interpreted the term, "alkyl" narrowly to exclude alkyl halides, or haloalkyls, and concluded that,

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*Alley*, 318 P.3d at __. Ms. McKean was charged with a violation of the statute as it read at the time Mr. Alley was charged.

[4] As of the writing of this brief, only the Pacific Reporter citation is available for *Alley*. The pinpoint cites are not yet available.

"AM–2201 is not included in the enumerated examples listed in I.C. § 37–2705(d)(30)(ii)(a)." *Alley*, 318 P.3d at ___.

The Court of Appeals then considered, "whether [AM-2201] may be encompassed within another portion of subsection (d)(30). The latter portion of subsection (d)(30) covers 'synthetic substances, derivatives, and their isomers with similar chemical structure such as the following,' after which nonexclusive lists of example substances are provided in subparts (i) and (ii)". *Alley*, 318 P.3d at ___. The court determined, "[i]t follows that AM–2201 is prohibited by I.C. § 37–2705(d) if it has a chemical structure similar to one of the chemicals listed thereunder. *Alley*, 318 P.3d at ___. The Court of Appeals held that, "[w]hether AM–2201 has a similar chemical structure to one of the example substances listed under the statute is a question of fact." *Alley*, 318 P.3d at ___. "This is a jury question bearing on the general issue of Alley's guilt or innocence that cannot be disposed of in a pretrial motion." *Alley*, 318 P.3d at ___. Because the Court of Appeals determined that Mr. Alley's pretrial motion to dismiss was procedurally improper, it ultimately affirmed the district court despite disagreeing with the court's interpretation of I.C. § 37-2705(d). *Alley*, 318 P.3d at ___.

In *Alley,* the Court of Appeals summarized the definition of an alkyl:

> the term "alkyl" includes, at a minimum, a "straight chain or a branched saturated chain hydrocarbon." In this sense, "alkyl" refers to a functional group that is composed solely of hydrogen and carbon atoms, has no double or triple bonds, and does not form a ring shape. The relevant functional group in AM–2201 is fluoropentyl. This functional group has no double bonds and does not form a ring shape. However, fluoropentyl is not a "hydrocarbon" because it contains a single fluorine atom. Because of the fluorine atom, the parties agree that fluoropentyl is an alkyl halide, which is also commonly referred to as a haloalkyl. A halide refers to the presence of a halogen and halogens are a category of elements that include fluorine.

*Alley*, 318 P.3d at ___. The dispute in *Alley*, as it was here, was whether "alkyl" could be read to include "alkyl halides." *Alley*, 318 P.3d at ___. (*See also* Tr., p, Vol. I, p.81, Ls.17-21 ("Q. And so is the disagreement, then, whether alkyl is a general term that necessarily includes haloalkyl? A. True."))

Like in *Alley*, the district court in this case was confronted with differing interpretations of the term, alkyl. In *Alley*, the State's expert testified that,

> he considered the language used in the foreign statute to be sufficiently broad because, in his view, the term "alkyl" includes alkyl halides with regard to naming the component structures. He believed that describing the "backbone structure" of a functional group was sufficient to describe the group or class a chemical fell within. This was based on his review of several textbooks and the IUPAC standards, which state that naming organic compounds starts with naming the parent structure, which is then modified to indicate the precise structural change required to generate the compound from the parent structure. While he conceded that fluoropentyl would have distinct chemical properties, he argued its "backbone structure" is pentyl, an alkyl. Accordingly, it was his opinion that AM–2201 is a chemical that falls within the examples enumerated in I.C. § 37–2705(d)(30)(ii)(a).

*Alley*, 318 P.3d at ___. The State's expert testified much the same way: Corinna Owsley also testified that naming organic compounds begins with naming the parent structure and then modified to indicate the "addition of the prefix or whatever halogen you have." (Tr., Vol. I, p.67, Ls.9-13.) She testified that a "haloalkyl is named by the base parent alkyl." (Tr., Vol. I, p.67, Ls.9-12.) Because of this, she testified that a haloalkyl would be described by the "umbrella term alkyl." (Tr., Vol. I, p.67, Ls.1-6.) Because of this, she testified that a haloalkyl "was intended to be included with the alkyl groups." (Tr., Vol. I, p.61, Ls.6-9.)

Ms. McKean's expert witness, Dr. Owen McDougal, also testified in the *Alley* case. As the Court of Appeals noted, Dr. McDougal,

> testified for the defense that the term "alkyl" excluded alkyl halides. He said that the term "alkyl" refers exclusively to a straight chain hydrocarbon

> with no double or triple bonds. He said this was consistent with the standardized IUPAC [International Union of Pure and Applied Chemistry] definitions. Because the term "alkyl" excludes alkyl halides, according to Dr. McDougal, AM–2201 would not fall within the enumerated examples in I.C. § 37–2705(d)(30)(ii)(a).

*Alley*, 318 P.3d at ___.

Just as he did in Mr. Alley's case, here Dr. McDougal testified that the term, "alkyl" excludes alkyl halides:

> From the context of how you would define an alkyl group and in the presence of additional heteroatoms, whether that would still be an alkyl or not, the definition of the alkyl in Morrison and Boyd fifth edition is pretty clear on it . . . where it is a derivative of an alkane minus one hydrogen atom. **The inclusion of heteroatoms alters the definition of what you're dealing with, and a haloalkyl being distinctly different from an alkyl.**

(Tr., Vol. I, p.165, Ls.4-14 (emphasis added.)) Dr. McDougal testified that AM-2201 was not an alkyl and not covered by the 2011 version of I.C. § 37-2705(d) because "AM-2201 is a haloalkyl attached to the nitrogen. That's clear as can be." (Tr., Vol. I, p.162, Ls.15-19.) He specifically disagreed with Ms. Owsley on this point. (Tr., Vol. I, p.165, Ls.1-14.) Thus, just an in *Alley*, the district court in this case heard divergent evidence on the definition of the term, alkyl.

In this case, the district court noted that the primary dispute was whether the term alkyl encompassed haloalkyls, but the court found,

> that that is irrelevant, for purposes of this discussion. Because whether it is an alkyl or whether it is a haloalkyl merely broadens or narrows the examples of kinds of substances that the legislature intends and passed to be controlled substances.
>
> And so whether it is an alkyl or a haloalkyl does not determine whether or not it is a controlled substance. It is a controlled substance because the lists of parent structures and substitutions are merely examples of the kinds of things that could be controlled substances. And so the Court finds that the statute is unambiguous, and that "such as "merely gives a list of examples, that it does not limit the statute to those substances listed.

> To the extent that the parties believe that "such as" is to be read differently, so as to limit, then the Court finds that the statute becomes potentially ambiguous, and we have competing principles. We have one giving the legislative intent of the legislature deference, as well as any anbiguities tend to be read in favor of the Defendant.
>
> I don't think those are necessarily competing, because in statutory construction, if it is ambiguous, you first look to the intent of the legislature. And the intent of the legislature, as contained in the exhibits, is to cut as broad a swath, or to create as broad a category as it could to prohibit and limit controlled substances that were the synthetic equivalents of tetrahydrocannabinoids (sic).

(Tr., Vol. I, p.209, L.15 – p.211, L.2.)

The district court erred. In light of *Alley*, it is relevant whether an alkyl encompasses a haloalkyl because this determines whether AM-2201 is an enumerated example listed in I.C. § 37-2705(d)(30)(ii)(a). *Alley*, 318 P.3d at ___. As the Court of Appeals has already determined, AM-2201 is not. *Id.* Further, whether AM-2201 has a similar chemical structure to one of the example substances listed under I.C. § 37-2705(d)(30) is a question of fact to be determined by the jury and is not determined by whether the legislature intended to create as broad a category as possible. *Alley*, 318 P.3d at ___. Because this is a question of fact, the district court erred by determining that the AM-2201, was, as a matter of law, a controlled substance pursuant to the 2011 version of I.C. § 37-2705(d).

As a result of the district court's holding, Ms. McKean was precluding from presenting evidence or argument that AM-2201 was not a controlled substance. The jury was instructed that AM-2201 was a controlled substance. (R., p.381.) Pursuant to *Alley*, this is error.

Ms. McKean submits that this error requires all of her convictions to be vacated. All of Ms. McKean's convictions relating to AM-2201, Counts II-V in CR 2012-21064, are

obviously effected by this error because she was prohibited from asserting that AM-2201 was not a controlled substance.

Ms. McKean also asserts that her convictions for the non-AM-2201 convictions, relating to Fire N' Ice, must also be vacated. Again, *Alley* provides guidance. In Alley, the defendant was charged in a single count with possessing three substances: JWH-019, JWH-201, and AM-2201. *Alley*, 318 P.3d at ___. The State asserted that the appeal was moot because Mr. Alley admitted that he violate I.C. § 37-2705(d)(30) irrespective of any determination that AM-2201 was a controlled substance. *Alley*, 318 P.3d at ___. However, the Court of Appeals determined that a holding that AM-2201 was not a controlled substance could give Mr. Alley a mistake of fact defense, namely that he only intended to possess AM-2201, negating the *mens rea* required for possession of the other substances. *Alley*, 318 P.3d at ___. The same is true in this case. If Ms. McKean were permitted to argue to the jury that AM-2201 was not a controlled substance, she could also assert a mistake of fact defense with regard to the other substances, JWH-210 and JWH-122, that were present in Fire N' Ice. The district court's holding removed with possibility from Ms. McKean. Thus, all of her convictions must be vacated.

II.

## The District Court Erred By Excluding Evidence That Ms. McKean Relied On Reports Indicated That The Substances Were Not Synthetic Cannabinoids

### A. Introduction

Ms. McKean asserts that the district court erred by excluding evidence of Ms. McKean's reliance on lab reports because they were relevant to the effect on the listenter.

B. Standard Of Review

In reviewing the trial court's decision as to relevance, the standard of review is de novo. *State v. Thompson,* 132 Idaho 628, 630 (1999) (citing *State v. Raudebaugh,* 124 Idaho 758, 766 (1993)). In reviewing the trial court's decision as to whether to exclude evidence pursuant to I.R.E. 403, the standard of review is abuse of discretion. *Id.*

C. The District Court Erred By Excluding Evidence That Ms. McKean Relied on Reports Indicated That The Substances Were Not Synthetic Cannabinoids

In this case, Ms. McKean obtained the various substances from internet websites. At trial, during the opening statements, counsel for Ms. McKean informed the jury that it would hear evidence that Ms. McKean received lab reports from these websites indicating that the products did not contain controlled substances. (Tr., Vol. II, p.144, Ls.16-20.) The State objected, asserting that, "this is not even a veiled attempt by the Defense to defend on the basis of mistake of law." (Tr., Vol. II, p.145, Ls.15-22.) Further, the State asserted that the reports would be inadmissible hearsay. (Tr., Vol. II, p.146, Ls.1-4.) Ms. McKean asserted that the reports were not hearsay because they would not be offered to prove the truth of the matter asserted; rather, the reports would be offered to show the effect on the listener. (Tr., Vol. II, p.146, Ls.13-21.)

After much discussion, the district court read a report into the record from AIBioTech. It stated,

> Six herbal blend (Purple Diesel, KO, Atomic, Caution, Dark Knight, Mad Hatter.) By comparison with various reference standards, table 1, sample six herbal blend (Purple Diesel, KO, Atomic, Caution, Dark Knight, Mad Hatter) **was found not to contain any synthetic cannabinoids**, as designated in Florida HB39 section 2(1) paren zero or lower case O, 40 through 44, S1502 section 1(1)(c) 46-50 and 114-142, and HB1175 section 1, 89303(6), 46-50 and 114-142. And there are a bunch of test results that list various synthetic cannabinoids.

(Tr., Vol. II, p.160, L.23 – p.161, L.11 (emphasis added.)) After more discussion, the district court decided to exclude the reports, stating,

> These documents establish a mistake of law, i.e., the substance that I possessed was not a controlled substance. This goes to whether or not the substances are legal or illegal, not to what the substances are. And so the Court is going to exclude this on a mistake of law basis.
>
> The Court is further going to find that whether or not these are synthetic cannabinoids, as designated in Florida, again goes to determining whether or not in Florida these would constitute illegal substances. There is nothing that would be relevant as to her knowledge about whether or not these substances would be legal or illegal in Idaho, so there's nothing relevant about this document. Even to show its effect on the listener would only show that if Ms. McKean were in Florida, these might be legal substances. But that has nothing to do with what would be legal or illegal in the State of Idaho.
>
> And so the Court's going to find that it is irrelevant, and under the balancing, to introduce this would be more prejudicial than probative, because it's going to confuse the jury about the mistake of law and mistake of fact issues.

(Tr., Vol. II, p.167, L.4 – p.168, L.4.)

The district court revisited the issue on the next morning of trial. The court held that the reports were not relevant because it was clear that "testing was not done on the samples or the substances that Ms. McKean received." (Tr., Vol. II, p.223, Ls.1-12.) Second, the list of substances tested was not exhaustive. (Tr., Vol. II, p.224, Ls.1-2.) Third, they were not relevant because they dealt with Florida law. (Tr., Vol. II, p.224, Ls.2-6.) Because the court found the reports not relevant, it held that it did not need to consider the effect on the listener; however, the concluded that the reports were "not a document on which she could rely, such that it would have an effect on the listener, because it very clearly does not apply to the samples that she obtained. (Tr., Vol. II, p.225, Ls.1-4.) The court concluded that the report it had "does not in any way indicate that the samples that they received did or did not contain any synthetic cannabinoid."

(Tr., Vol. II p.225, Ls.5-14.) Finally, under a Rule 403 balancing test, the court concluded that the evidence would be confusing to the jury. (Tr., Vol. II p.225, Ls.15-24.) Counsel then submitted a packet of the reports to the district court for purposes of the record. (Defendant's Exhibit A; Tr., Vol. II p.229, Ls.1-6.)

Later, for purposes of making a record on appeal, Ms. McKean gave an offer of proof as to what she would have testified to regarding these reports. She testified that on May 1, 2012, she opened a shop called Smoke Effects in Caldwell. (Tr., Vol. II, p.382, L.14 – p.383, L.9.) On April 26 or 27, 2012, she went to city hall to obtain a business permit; the business permit allowed her to open her store on May 1. (Tr., Vol. II, p.384, Ls.7-21.) Ms. McKean stated that she ordered her products over the internet; "Johnny Clearwater" was the first product that she obtained, afterward, she received other products such as "Scooby Snax, Mad Hatter, Down 2 Earth, [and] AK-47." (Tr., Vol. II, p.385, L.22 – p.386, L.24.) She obtained a product called "Fire N' Ice" from another website called salviaextracts.com. (Tr., Vol. II, p.387, Ls.10-12.)

Ms. McKean testified that she did not know that any of these products contained "synthetic drugs or synthetic cannabinoids or synthetic marijuana." (Tr., Vol. II, p.387, Ls.13-17.) She had never heard the term, "cannabinoid" prior to trial and if she had known the products contained synthetic marijuana or drugs she would never have ordered them. (Tr., Vol. II, p.387, Ls.18-22.) She did not believe that the products contained synthetic drugs because,

> the websites that I went to told me – or it says right on them that they are 50 state legal. They send you an email saying what's – the lab results that came with it that tell you what's in it and what's not in it, basically. And it – and every order you get, you also get a hard copy in the package, same lab results, saying what's – what – what's not in it.

(Tr., Vol. II, p.388, Ls.17-25.) Ms. McKean testified that the products were for burning in a Scentsy container. (Tr., p.395, Ls.4-12.) She also testified that, because of the reports, she did not believe that she was in possession of any synthetic drugs. (Tr., Vol. II p.400, Ls.14-19.) Ms. McKean asserts that the district court erred because the reports are relevant to a mistake of fact defense; specifically, the effect on the listener.

First, Ms. McKean never sought a mistake of law defense. Prior to trial, counsel stated, "I concede that when there's not a specific intent crime, there can be no mistake of law." (Tr., Vol. I, p.219, Ls.1-3.) Further, Ms. McKean did not object to the district court instructing the jury, after making his opening statement, that mistake of law was not defense. (Tr., Vol. II, p.173, L.14 – p.175, L.18.)[5]

Ms. McKean submits that the lab reports are relevant to show a mistake of fact – namely, that she did not believe that she possessed synthetic cannabinoids. Part of the district court's holding – that Ms. McKean's knowledge of whether a substance is *illegal* is not relevant to a mistake of fact – is well taken. *See State v. Fox*, 124 Idaho 924, 926 (1993). This is a mistake of law and is not a defense. *Id.*

However, "one might possess an illegal drug under the mistaken belief that it was a legal substance," and this mistake of fact, "if believed by the jury, requires an acquittal because the criminal intent element of the offense is not present." *State v. Stefani*, 142 Idaho 698, 703 (Ct. App. 2005) (citing *State v. Blake*, 133 Idaho 327, 242 (1999)). It was for this purpose that reliance on the lab reports was offered.

The lab reports do more than state whether the substances were illegal in other jurisdictions. (See Defendant's Exhibit A.) Many of the reports indicate that the

[5] Counsel for Ms. McKean did object to giving a post-proof mistake of law, but only on the basis that a mistake of law defense was not presented at trial and, therefore, there was no evidence to support the instruction. (Tr., Vol. II, p.430, Ls.20-25.)

company, Al BioTech, "makes no claims as to the legality of use of the test substance provided for analysis." (*See, e.g.*, Defendant's Exhibit A, pp.217, 219, 221.) Thus, the lab reports were not (and could not) be submitted to demonstrate a mistake of law. However, the lab reports, in addition to stating that substances were not synthetic cannabinoids pursuant to Florida also, also provided a table listing which substances were not detected in the products. (*See, e.g.,* Defendant's Exhibi A at pp.220, 222, 224.) Thus, the reports indicate that many synthetic cannabinoids *are not detected* in the samples. (*See, e.g.,* Defendant's Exhibi A at pp.220, 222, 224.) Ms. McKean possessed reports indicated that substances such as "Scooby Snax" and "Mad Hatter Blueberry" did not contain an entire list of synthetic cannabinoids. (*See, e.g.*, Defendant's Exhibit A, p.224.)

Ms. McKean acknowledges that in order to prevail on the defense, a mistake of fact must be reasonable to be believed by a jury. And the State could certainly assert at the trial that reliance on the reports was unreasonable. That, however, is a question for the jury, not a question of admissibility. Thus, the district court's concerns that the testing was not done on the specific substances Ms. McKean received and was not exhaustive are relevant, but are not reasons to exclude the evidence. These concerns address *the reasonableness* of Ms. McKean's reliance, not that she did not or could not rely on them at all. Ms. McKean only sought to introduce the reports to establish a mistake of fact, namely Ms. McKean's belief that the products were not synthetic cannabinoids. The district court erred in concluding that the reports were relevant only to demonstrate a mistake of law and that Ms. McKean could not rely on them.

Further the reports are not hearsay. "It is well established that out-of-court statements are not barred by the hearsay rule when offered to show their effect on the

listener." *State v. Siegel*, 137 Idaho 538, 540 (Ct. App. 2002) (quoting McCormick on Evidence § 249 (John W. Strong ed., 5th. Ed.1999) ("A statement that D made to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X....")). In this case, the reports are not hearsay because their purpose was to establish the state of mind induced in Ms. McKean. Whether or not the statements in the reports are true is not significant – only the effect that the statements had on Ms. McKean is relevant. Ms. McKean was not attempting to establish as truth that the products were not synthetic cannabinoids. She was only seeking to establish that *she did not believe* that they were synthetic cannabinoids. Thus, the reports are not hearsay and the district court erred in concluding that they were.

Finally, Ms. McKean asserts that the district court abused its discretion by concluding that, pursuant to IRE 403, this evidence would be confusing to the jury. The decision to exclude relevant evidence under Rule 403 is reviewed for an abuse of discretion. *State v. Shutz,* 143 Idaho 200, 202 (2006). When a trial court's discretionary decision is reviewed on appeal, this Court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger,* 115 Idaho 598, 600 (1989).

While a district court has the discretion to exclude relevant evidence pursuant to IRE 403 if the evidence is confusing to the jury, Ms. McKean submits that the district court's conclusion that the jury would be confused was not reached by an exercise of

reason. The Court of Appeals has succinctly summarized the difference between a mistake of law and a mistake of fact:

> the individual might possess a substance knowing what it was, but unaware that it was classified as a controlled substance and that its possession was therefore unlawful. Such a mistake of law is not a defense. *[State v. Fox,* 124 Idaho 924, 926 (1993)]. Second, one might possess an illegal drug under the mistaken belief that it was a legal substance-for example possessing methamphetamine while truly believing that it was sugar. In such a case, the defendant's mistake of fact, if believed by the jury, requires an acquittal because the criminal intent element of the offense is not present. *Blake,* 133 Idaho at 242, 985 P.2d at 122; *State v. Tucker,* 131 Idaho 174, 178, 953 P.2d 614, 618 (1998) (Schroeder, J., specially concurring).

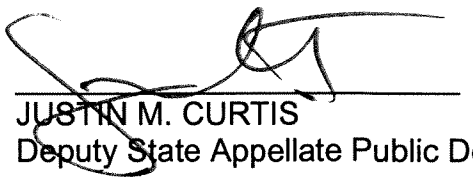
*State v. Stefani*, 142 Idaho 698, 703 (Ct. App. 2005). Any confusion about Ms. McKean's reliance on the reports could be easily solved by simply instructing the jury that a mistake of law was not a defense but a mistake of fact was, if believed by the jury. Ms. McKean's argument concerning reliance on the reports is straightforward – she asserted that she did not believe that she possessed synthetic drugs, she believed that she possessed potpourri for use in Scentsy candles. The fact that Ms. McKean received reports with tables indicating that a number of synthetic cannabinoids were not present in other samples tested is relevant to her state of mind.

Thus, Ms. McKean asserts that the evidence concerning her reliance on the reports was relevant to show the effect on the listener and was not sought to establish a mistake of law. Because the district court incorrectly held otherwise, Ms. McKean's convictions must be vacated and her case reversed.

## CONCLUSION

Ms. McKean requests that her convictions be vacated and her case remanded for further proceedings.

DATED this 20th day of March, 2014.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of March, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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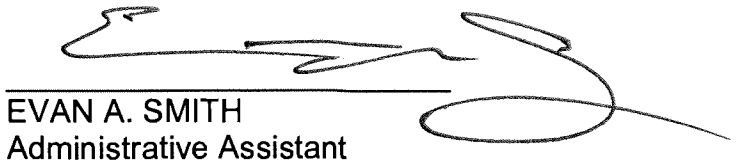

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JMC/eas